SEIZURE OF INCRIMINATING EVIDENCE AT TIME OF PRISONER'S ARREST. — In a recent federal case, the prosecution was ordered to return to the prisoner before trial certain incriminating books and papers that had been seized without a warrant at the time of the prisoner's arrest on the ground that the seizure was unreasonable under the Fourth Amendment[1] to the federal Constitution. *United States* v. *Mills*, 185 Fed. 318 (Circ. Ct. S. D. N. Y.).[2] This decision was frankly based on a *dictum* of the United States Supreme Court,[3] in which it was broadly laid down that any search and seizure is unreasonable that obtains evidence incriminating the person whose premises are searched. The reasoning by which this conclusion was reached was, that since a search and seizure by which incriminating evidence is obtained is contrary to the Fifth Amendment,[4] such a seizure is conclusively unreasonable. But it must be denied that a person is "compelled to be a witness against himself" when incriminating evidence is simply seized from him, and no testimonial word or act on his own part is required.[5] The two Amendments have different origins,[6] and should not be confused.

The conception that it is unreasonable to seize from a person and offer in evidence against him things that he could not be compelled to produce under a subpœna *duces tecum*[7] is often a useful test of unreasonableness.[8] How far this rule can be followed, however, is doubtful.[9] It seems hardly the conclusive test that the language of the Supreme Court assumes it to be. For since the Fifth Amendment is not violated by a search or seizure to obtain incriminating evidence, and since the Fourth Amendment prohibits only unreasonable searches and seizures, it would seem that there may be instances where a search and seizure is reasonable and proper, and hence constitutional even though incriminating evidence is thereby obtained.

It must be remembered that the Fourth Amendment is properly nothing more than a constitutional pronouncement of a common law rule,[10]

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[1] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] *Contra*, United States *v.* Wilson, 163 Fed. 338.

[3] Boyd *v.* United States, 116 U. S. 616. The decision simply was that papers produced by the defendant under a statutory order of court were improperly admitted in evidence over the defendant's objection, since it infringed the privilege against self-incrimination.

[4] The Fifth Amendment provides, *inter alia*: "Nor shall [any person] be compelled in any criminal case to be a witness against himself."

[5] Adams *v.* New York, 192 U. S. 585. See 3 WIGMORE, EVIDENCE, §§ 2263, 2264. The result of this questionable reasoning in the Boyd case has been the following decisions: United States *v.* Wong Quong Wong, 94 Fed. 832; State *v.* Slamon, 73 Vt. 212; State *v.* Sheridan, 121 Ia. 164.

[6] See 3 WIGMORE, EVIDENCE, § 2250 *et seq.* For the historical causes of the Fourth Amendment, see COOLEY, CONST. LIM., 7 ed., 424 *et seq.*

[7] "But in a criminal or penal cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in court." Lord Mansfield in Roe *v.* Harvey, 4 Burr. 2484, 2489.

[8] See Entick *v.* Carrington, 19 Howell's State Trials, 1030, 1073.

[9] See COOLEY, CONST. LIM., 7 ed., 432.

[10] See STORY, CONSTITUTIONAL LAW, 4 ed., § 1902.

well recognized in England before the adoption of the Amendment,[11] and incorporated in the constitutions of the various states.[12] So, the judicial determination in those jurisdictions of what is reasonable is professedly a declaration of the same law that is embodied in the federal Amendment. Certain exceptions to the broad language of the Supreme Court are well recognized. In the collection of taxes,[13] the regulation of certain businesses,[14] the recovery of stolen goods,[15] and the confiscation of illegal property[16] a search and seizure has been held reasonable though productive of incriminating evidence.[17]

And the principal case affords another example of a search and seizure for the purpose of punishing crime which has never been considered as transgressing the bounds of reasonableness.[18] For it has been recognized that when a person charged with a crime is arrested by a proper warrant,[19] it is reasonable to seize without a warrant property and papers found in his possession at the time of the arrest, for the very purpose of using them as evidence against him.[20] This does not seem to be a confiscatory right, but rather one "derived from the interest which the state has in a person guilty of a crime being brought to justice, and in a prosecution once commenced being determined in due course of law."[21] The seizure must be simultaneous with and growing naturally out of the arrest, but the fact that no search warrant is issued seems immaterial.[22] If, therefore, the *dictum* of the Supreme Court is not read with reference to its particular circumstances, the language may prove, as shown by the principal case, a misleading test of reasonableness.

THE "NET VALUE" OF A LIFE INSURANCE CONTRACT. — On the average, twelve out of every thirteen life insurance policies are surrendered or forfeited for the non-payment of premiums.[1] In case of forfeiture

[11] See Entick *v.* Carrington, *supra*; Money *v.* Leach, 3 Burr. 1742.

[12] The Fourth Amendment is probably not a limitation on the power of the states. Barron *v.* City of Baltimore, 7 Pet. (U. S.) 243. See COOLEY, CONST. LIM., 6 ed., 29. But see Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 553.

[13] Stockwell *v.* United States, 3 Cliff. (U. S.) 284.

[14] Joseph *v.* Levin, 128 Mo. 588 (pawnbrokers' books open to inspection).

[15] Houghton *v.* Bachman, 47 Barb. (N. Y.) 388.

[16] State *ex rel.* Milwaukee *v.* Newman, 96 Wis. 258 (gambling apparatus). See Glennon *v.* Britton, 155 Ill. 232, 245. This class of cases seems to be recognized in Boyd *v.* United States, *supra*, 623, 624.

[17] See Spalding *v.* Preston, 21 Vt. 9; State *v.* Robbins, 124 Ind. 308.

[18] See Adams *v.* New York, 192 U. S. 585, 598.

[19] An arrest without a warrant may be reasonable, as where the prisoner was committing or had freshly committed a crime. North *v.* People, 139 Ill. 81.

[20] Rex *v.* Barnett, 3 C. & P. 600; Commonwealth *v.* Dana, 2 Met. (Mass.) 329 (books of seller of lottery tickets); Smith *v.* Jerome, 47 N. Y. Misc. 22.

[21] Dillon *v.* O'Brien, 16 Cox C. C. 245, 249. See Holker *v.* Hennessey, 141 Mo. 527, 539–541.

[22] Since the papers to be seized are sufficiently designated, namely, incriminating evidence found in the prisoner's possession at the time of the arrest, there is no necessity for a search warrant. See cases in notes 20 and 21. A search warrant would not have made the search in the principal case any more reasonable under the language of Boyd *v.* United States, *supra*.

[1] This average is based on 1,525,302 policies in the Mutual, Metropolitan and Prudential Insurance Companies. See BRANDEIS, LIFE INSURANCE, 14.